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Nos. 90-1721, 90-1725, 90-1760, 90-1949

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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NEW YORK CITY PUBLIC UTILITY SERVICE,
*Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.*

VERMONT DEPARTMENT OF PUBLIC SERVICE,
*Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.*

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
*Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.*

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND THE RHODE ISLAND PUBLIC UTILITIES COMMISSION,
*Cross Petitioners*,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
*Cross Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit**

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# PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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[Counsel Listed On Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

DAVID R. STRAUS
SCOTT H. STRAUSS
SPIEGEL & MCDIARMID
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
(202) 879-4000

*Attorneys for Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company*

ROBERT WEINBERG
CHARLES F. HOLUM
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

*Attorneys for Allegheny Electric Cooperative, Inc.*

REUBEN GOLDBERG
CHANNING D. STROTHER, JR.
GOLDBERG, FIELDMAN & LETHAM, P.C.
1100 Fifteenth Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 463-8300

CRAIG S. MILLER
JUNE W. WEINER
WILLIAM M. ONDREY GRUBER
City of Cleveland
Department of Law
Room 106, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

*Attorneys for the City of Cleveland*

WALLACE L. DUNCAN*
JEFFREY C. GENZER
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

*Attorneys for the Municipal Electric Utilities Association of New York State*

**Counsel of Record*

KIRK HOWARD BETTS
DICKINSON, WRIGHT, MOON VAN DUSEN & FREEMAN
1901 L Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 457-0160

*Attorney for the Public Power Association of New Jersey*

## QUESTION PRESENTED

1. Whether the court below acted properly in affirming the Federal Energy Regulatory Commission's determination of the criteria which must be met in order to be a "public body" under the Niagara Redevelopment Act and its determination that petitioners did not qualify to purchase Niagara Redevelopment Act preference power?

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## PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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Respondents Allegheny Electric Cooperative, Inc. ("Allegheny"), the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), the Municipal Electric Utilities Association of New York State ("MEUA") and the Public Power Association of New Jersey ("PPANJ") (collectively referred to herein as "Public Systems"), all intervenors in the court below,

respectfully pray that the Court deny the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949.

## STATEMENT OF THE CASE

This case presents for consideration the third recent and related appeal of a Federal Energy Regulatory Commission ("FERC" or "Commission") decision concerning the allocation of Niagara Project hydroelectric power under the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.* ("NRA").[1] Less than five years ago, this Court denied multiple petitions for writs of certiorari in *MTA*. The petitions filed here present nothing that has not previously been submitted to this Court. They should also be denied.

The Court's evaluation of the petitions will be greatly aided by a brief overview of the NRA and recent litigation concerning its meaning. The NRA directed the Federal Power Commission (now the FERC) to issue a license to the Power Authority of the State of New York ("PASNY") under Part I of the Federal Power Act, 16 U.S.C. § 791 *et seq.* The license permitted PASNY to construct and operate a hydroelectric power project on the Niagara River, between New York and Canada.

The NRA also directed the Commission to include a "preference" clause in the license, which states that:

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[1] The other two cases are: *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*") and *Metropolitan Transp. Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Elec. Coop., Inc. v.* FERC, 479 U.S. 1085 (1987) ("*MTA*").

> [T]he licensee in disposing of 50 per centum of the project power *shall give preference and priority to public bodies* and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1) (emphasis added). This clause, the meaning of which was litigated in *PASNY* and *MTA*, was explained in the opinion under consideration here:

> The fifty percent of Niagara Project power set aside for "public bodies and nonprofit cooperatives" is referred to as preference power. Those entities eligible to receive an allocation of this preference power are called preference customers. To be a "preference customer", an entity first must qualify as a "public body".

*Allegheny Electric Cooperative, Inc. v. FERC*, 922 F.2d 73, 76-77 (2d Cir. 1990) ("*Allegheny v. FERC*"), P.A. at 5-6.[2] The three petitioners and the cross-petitioner herein all claim that they are NRA "public bodies," and are thereby entitled to preference power allocations.

A. *Prior Cases.* Litigation over the NRA's phrase "public bodies" began several years ago. In the 1984 *PASNY* decision, the Second Circuit affirmed the Commission's determination that an NRA "public body" must, *inter alia*, be the type of entity which fosters "yardstick competition," described in its sim-

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[2] References to the decisions of the Commission and the court below included in the "Appendix to Petitions For Writ of Certiorari" are designated as "P.A.".

plest form as competition by example. *PASNY*, 743 F.2d at 105. The FERC and the court also ruled that NRA "public bodies" are only those publicly-owned entities that sell and distribute preference power directly to consumers. *MEUA v. PASNY*, Opinion No. 151, 21 FERC (CCH) ¶ 61,021 at pp. 61,105-11, 61,129 (1982). In affirming the Commission, the Second Circuit conducted its own analysis of the NRA's legislative history, and also accorded " 'great deference' " to the Commission's conclusions, because they came from the "agency charged with [the NRA's] administration." *PASNY*, 743 F.2d at 103, 105 (citations omitted).

In *MTA*, the FERC and the Second Circuit considered whether New York's Metropolitan Transportation Authority ("MTA") and the Vermont Department of Public Service ("VDPS") were "public bodies." The FERC concluded that the MTA and VDPS were not NRA "public bodies," because neither was capable of selling and distributing power directly to consumers at retail. *MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC (CCH) ¶ 61,323, at p. 61,651 (1985). The Second Circuit again affirmed the FERC's determinations. *MTA*, 796 F.2d at 590, *quoting* Opinion No. 229, 30 FERC at 61,651. In so concluding, the court again reviewed the NRA's legislative history, stating:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that is what Congress intended the term to mean.

*Id.* at 591. This Court then denied two petitions for writs of certiorari and a cross-petition filed by the State of Rhode Island. 479 U.S. 1085 (1987).[3] But for the change in certain parties, *MTA* might well be said to collaterally estop relitigation of the issues presented by petitioners here.

B. *The Present Case.* This case stems from PASNY's 1985 decision to allocate preference power to numerous so-called "Municipal Distribution Agencies" ("MDAs"),[4] including petitioners County of Westchester Public Utility Service Agency ("COWPUSA") and New York City Public Utility Service ("NYCPUS"), and to the revised VDPS.[5] Both the MDAs

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[3] Two of the petitions, filed by the MTA, No. 86-736, and by the State of Rhode Island, No. 86-942, challenged FERC's ruling on the nature of the NRA's "preference" clause and the definition of the term "public bodies". Rhode Island's 1986 cross-petition raised many of the issues raised again here. Petitioner Allegheny sought review only of the FERC's interpretation of the NRA term "neighboring states."

The State of Rhode Island's current cross-petition is similar in at least one respect to its 1986 cross-petition: it is based on an exceedingly limited participation in the case at the Commission. Rhode Island did not seek to participate in the hearing underlying Opinion No. 329, and was only granted intervention in that decision itself. P.A. at 68-69.

[4] The term "MDA" refers to paper agencies created in counties and cities in New York State, with the unusual assistance of New York's investor-owned utilities, the MDAs' alleged competitors, to serve as conduits for the delivery of NRA preference power to customers of investor-owned utilities.

[5] As explained in *Allegheny v. FERC* (P.A. at 8), following the issuance of Opinion No. 229, VDPS was the subject of state legislation "aimed at satisfying the Commission's 'public body' definition" in *MTA* and *PASNY*.

and VDPS sought to satisfy the NRA "public body" criteria of *MTA* and *PASNY* by entering into arrangements under which petitioners purported to serve "their" customers by purporting to "lease" electric distribution facilities from allegedly competing local investor-owned utilities. These leases provided that the private utilities would continue to perform all distribution and billing functions. Public Systems challenged PASNY's allocation decisions at FERC, contending that neither the MDAs nor VDPS constituted "public bodies."

In *MEUA v. PASNY*, Opinion No. 329, 48 FERC (CCH) ¶ 61,124 (1989), the Commission explained that the MDA and VDPS "lease" arrangements had several pertinent common features. In the case of the MDAs, the Commission found that the investor-owned utility "lessor":

> (1) . . . retains the franchise responsibility to supply the full requirements of its customers for electric service; (2) the IOU [investor-owned utility] remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU; (3) the IOU has exclusive control of its entire system, leaving no room for assertion by the MDAs of control over distribution facilities; (4) the IOU may suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted

> against the IOU; and (5) the IOU issues the bills, which do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power, thus giving no opportunity to compare the quality of service or price.

P.A. 94-95. With regard to VDPS, the Commission confirmed (P.A. 100-101) the conclusions of its Administrative Law Judge ("ALJ") that, despite the "leases," VDPS: (1) had no direct responsibility for retail electric distribution, "since under the lease and operating agreements and the service contracts the [lessor] utilities perform all the utility functions"; (2) had no control of the "lessor's" distribution system; (3) could not foster competition because VDPS's "costs of operations are basically those of the utility"; and (4) could only "serve" customers who were also customers of the privately-owned utility "lessor". Initial Decision, P.A. 60-61.[6] On the basis of these fac-

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[6] VDPS, citing Appendix page 60, states that the ALJ "concluded that [VDPS] . . . has the ability to provide its service to virtually any resident of Vermont upon request." VDPS's selective quotation is misleading. In fact, the Judge qualified the cited "conclu[sion]" as follows:

> While VDPS will supply electricity to any resident on request, one condition exists, the resident must also be a customer of the privately owned utility. Otherwise, power is not available. Thus, there is no real competition for new customers.

P.A. at 60. In other words, VDPS could not "provide its service to virtually any resident" unless the resident was in fact served by the local investor-owned utility. The result is that the retail customer has no choice of electric suppliers, and the only distributor is the investor-owned utility, not the alleged public body.

tual findings, the Commission determined that neither the MDAs nor VDPS qualified as an NRA "public body," because they were not selling and distributing preference power directly at retail.

The FERC, in Opinion No. 329, also refined the "yardstick competition" standard it had developed in the prior cases, holding that an NRA "public body" must provide such competition by: (a) being the type of entity which can threaten to take over or displace the private utility; (b) substantially meeting the energy needs of *its* customers, and (c) providing a basis for comparison with investor-owned utility rates and service. A "public body" must be directly responsible for serving its retail consumers, and must control its distribution system. Opinion No. 329, P.A. at 87-89, 94.[7]

The Commission determined that VDPS and the MDAs did not meet any of these criteria, as they could not pose any competitive threat to investor-owned utilities. The Commission concluded that under the "lease" arrangements, investor-owned utility customers receive low-cost NRA "preference" power without having to create a publicly-owned power system, rendering petitioners nothing more than paper conduits for that power. As explained by the FERC:

> [T]he MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has

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[7] *See also Allegheny*, 922 F.2d at 79, P.A. at 9-10; *MEUA v. PASNY*, Initial Decision, 42 FERC (CCH) ¶ 63,018 (1988), P.A. 40-42, 54-61.

> been repeatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

On appeal, the Second Circuit affirmed the Commission's criteria and the FERC's application of the criteria to the MDAs and VDPS, emphasizing, as in *PASNY*, that "FERC is the agency that is responsible for administering the NRA," and that on questions of statutory interpretation, " 'great deference' must be accorded 'to the interpretation given the statute by the officers or agency charged with its administration.' " *Allegheny*, 922 F.2d at 80, P.A. at 12, *quoting PASNY*, 743 F.2d at 103, *quoting Connecticut Fund for Environment, Inc. v. EPA*, 696 F.2d 169, 173 (2d Cir. 1982).

## REASONS FOR DENIAL OF THE WRIT

The petitions and cross-petition should be denied because they do no more than rehash arguments raised and rejected numerous times. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. The case involves a federal statute, but presents no major federal or constitutional question. In essence, this case concerns nothing more than an interpretation of a statute by the agency charged with its administration, and a decision by an appellate court that the agency's interpretation was a reasonable one.

1. Petitioners argue that Court review is warranted because of several alleged errors in the lower court's application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Specifically, petitioners argue that the court below

improperly deferred to the FERC where: (1) the Commission's ruling was itself based upon an erroneous reading of *MTA* (VDPS Petition at 13-15; NYCPUS Petition at 12-14);[8] (2) deference should have been accorded to PASNY (which had found that the MDAs and VDPS were NRA "public bodies"), not the FERC (VDPS Petition at 15-16; COWPUSA Petition at 27-28); and (3) the Commission's interpretation of the NRA "has changed several times". VDPS Petition at 10.

The lower court's application of the *Chevron* doctrine was appropriate. *Chevron* describes a two-step analysis to be applied when a court is faced with review of an agency's "construction of the statute which it administers":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

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[8] It is noteworthy that cross-petitioner Rhode Island raised this same argument in its 1986 cross-petition for a writ of certiorari, which this Court denied. *See* No. 86-942, Cross Petition at 21-26; *cert. denied*, 479 U.S. 1085 (1987).

467 U.S. at 842-43 (footnotes omitted). Thus, the Second Circuit first determined that the term "public body" is "not defined in the NRA," and that, therefore, it was appropriate to review the Commission's interpretation of the term. *Allegheny v. FERC*, 922 F.2d at 81, P.A. at 14. Following this Court's *Chevron* analysis, the Second Circuit then found the Commission's three-part criteria to be "reasonable":

> Although we might not have adopted these exact criteria had we analyzed these issues in the first instance, the Commission's construction of the statutory term "public bodies" is not so unreasonable as to amount to an arbitrary and capricious action. In reviewing the Commission's construction, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, (citations omitted).

922 F.2d at 82, P.A. at 16-17. Notwithstanding the court's use of the subjunctive "might" rather than "would" (as VDPS would have it), the Second Circuit cited no instance in which its views differed from those of the Commission, stating instead its agreement with the Commission's "control" criterion. *Id.* at 84 P.A. at 20.[9]

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[9] Undaunted, VDPS claims that it has "been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, *the Second Circuit disagrees*, but nonetheless concludes that affirmance is compelled

VDPS, joined by NYCPUS, argues that the court erred in that the Commission was entitled to no *Chevron* deference because it had wrongly found that the "key determinant of public body status," "complete operational control of distribution facilities," originated in the Second Circuit's *MTA* decision. VDPS argued:

> *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a)(emphasis added).

Petition at 13; *see also* NYCPUS Petition at 13. VDPS goes on to argue that because *MTA* did not address the "control" issue, the Commission could not properly rely upon the decision as the basis for the "control" criterion.

The contention that the Commission, in determining that distribution system control was a "public body" criterion, incorrectly believed itself bound by *MTA*, is not supported by an accurate, complete quotation of the language of the FERC decisions in this proceeding. The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a "public body" control a distribution system; instead, the Commission stated that "the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution." Opinion No. 329, P.A. at 86 (emphasis added). The FERC's reliance then was not on *MTA*, but on the

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under *Chevron*" (Petition at 15, emphasis added). VDPS cites no support for the contention that the "Second Circuit disagrees," and the content of the court's opinion is to the contrary.

legislative history discussed in *MTA*. Shortly thereafter, the FERC stated:

> The ALJ correctly found that to "sell and distribute power directly to consumers of electricity at retail" requires direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity must have control over its distribution system.

Opinion No. 329, P.A. at 88 (footnote omitted).

Thus, the Commission's control criterion was based upon its own interpretation of: (a) NRA legislative history (discussed in *MTA*); and (b) the "sell and distribute directly" standard, which was developed by the FERC in Opinion Nos. 229 and 229-A (MMWEC and CMEEC v. PASNY, 32 FERC (CCH) ¶ 61,194 (1985)), and affirmed in *MTA* (and which this Court chose not to review). Thus, the VDPS-NYCPUS "circle of deference" argument, the linchpin of the two petitions, collapses.

Moreover, support for VDPS's claim that the control criterion was the "key determinant" of "public body status under FERC Opinion No. 329" is nowhere to be found in either the Commission or court decisions. This contention appears to be part of a strategy to disregard or finesse another of the Commission's "public body" criteria, *i.e.* that preference power purchasers must be "directly responsible" for the retail distribution of electricity directly to customers.[10] Petitioners obviously cannot meet this cri-

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[10] For example, in reviewing the ALJ's decision, VDPS states that the Judge's determination that VDPS did not qualify as an

terion because they have assumed *no* utility responsibilities. Instead, VDPS attempts to sweep the "direct responsibility" criterion within its erroneous claims about "control." Thus, VDPS argues that "control" and "direct responsibility" are treated "interchangeably" in the FERC and court orders, and then tries to mount another "circle of deference" claim, stating that the

> [D]irect responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities.

VDPS Petition at 23 n. 17.

The "direct responsibility" criterion is not "derive[d] from FERC's interpretation" of *MTA*, but is instead based on the FERC's own determination in Opinion Nos. 229 and 229-A (affirmed in *MTA*) that an NRA "public body" must be capable of direct retail distribution and cannot "arrange" for such distribution.[11] The statement that "FERC concluded that to

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NRA "public body" relies "principally" on "his control criterion." The cited pages of the decision (Initial Decision, P.A. at 60-61), in which the ALJ evaluates VDPS against the yardstick competition, direct responsibility and control criteria, do not support VDPS's assertion.

[11] As stated by the FERC in Opinion No. 229, the "requirement for direct responsibility is established by court and Com-

be directly responsible *MTA* requires control" is not accompanied by any citation and, as demonstrated above, is contrary to the language of the FERC opinion. Opinion No. 329, P.A. at 881.

It bears noting that just as the Commission did not blindly rely upon *MTA*, neither did the Second Circuit blindly defer to the FERC. The court stated that it "agree[s] with the Commission that the exercise of such control [over distribution] is essential to a finding of 'public body' status." *Allegheny*, 922 F.2d at 84, P.A. at 20. Thus, there was no abdication on the part of either the Commission or the court of their respective duties to evaluate independently the appropriate NRA "public body" criterion.[12]

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mission precedent which refer to 'direct' distribution to the retail customer." P.A. at 83 n.36 (citations omitted).

[12] In general, VDPS seems confused about who -- as between FERC and the Second Circuit -- decided what. Thus, VDPS states that

> [I]n adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a).

VDPS Petition at 7. Opinion No. 329 contains no statement, at page 86 or anywhere else, that in affirming the ALJ's criteria, FERC was "merely following . . . *MTA*." Moreover, VDPS's quote of the Second Circuit holding fails to note that the court itself was quoting -- and affirming -- the Commission's determination in Opinion Nos. 229 and 229-A. *MTA*, 796 F.2d at 593 ("[w]e therefore affirm FERC's conclusion that the term 'public bodies' . . . means 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity

As a fallback position, VDPS argues that the lower court also erred in that Opinion No. 329 conflicts with the "plain purpose" of the NRA. Petition at 21. That "purpose," which VDPS contends it fulfills, is to "promote 'yardstick competition' between public bodies and private utilities. *MTA*, 796 F.2d at 593." Petition at 19.[13]

The Commission explained why VDPS could neither promote such competition, nor fulfill the statutory objective:

> [S]ince VDPS leases its distribution facilities from the IOUs [investor-owned utilities], and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus, no benchmark is possible, and VDPS does not foster yardstick competition.

Opinion No. 329, P.A. at 101.

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at retail' "). Once again, VDPS's "circle of deference" argument relies upon a misrepresentation of the agency and judicial decisions below.

[13] It is also noteworthy (though hardly surprising) that in making this argument VDPS again changes the words of the Second Circuit. The court in *MTA*, 796 F.2d at 592, 593 referred to the fostering of yardstick competition between "private utilities" and either "publicly-owned" or "municipal utilities," not "public bodies." Nonetheless, VDPS repeatedly (Petition at 19, 20 and 24) refers to "public bodies," not "municipal utilities," the phrase used by the court in *MTA*. VDPS's purpose in presenting this misstatement is obvious: yardstick competition requires, first and foremost, a publicly-owned "utility," not merely a public agency authorized to enter into "lease" arrangements which convey no substantive rights.

The Second Circuit endorsed this analysis:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the objective of the NRA, it is difficult to see how the leasing arrangements at issue advance that fundamental objective.

*Allegheny*, 922 F.2d at 85, P.A. at 21.[14]

Petitioner COWPUSA raises here for the first time in this proceeding the claims that the Second Circuit used "legislative history" to add a "concept, 'yardstick competition,' which has no basis in law or economics and which contradicts the express purposes and intent of the statute" (COWPUSA Petition at i). Cross-petitioner Rhode Island asks the Court to "rein in" the use of legislative history. Rhode Island Cross-Petition at 7-10. These arguments do no more than betray COWPUSA's and Rhode Island's desperation. The same COWPUSA joined in a brief before the Second Circuit which states that the MDAs "provide yardstick competition as envisioned by Congress."[15]

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[14] VDPS argues (Petition at 23) that in this quote the Second Circuit was stating that the absence of distribution cost competition was the " 'most compelling' rationale cited by FERC for the imposition of an operational control requirement." The quote clearly refers to competition, not control. VDPS's characterization is wrong; the reason for its mischaracterization is transparent.

[15] "Joint Brief of MDAs and Supplemental Brief of VDPS," dated July 19, 1990, at page 20.

COWPUSA's attempt now to raise matters not raised below or even contrary to those it raised below should be rejected. *See McCullough v. Kammerer Corporation, et al.*, 323 U.S. 327, 328 (citing cases) (1945).[16]

Finally, cross-petitioner Rhode Island attempts to disown the purpose of the NRA by claiming that the " 'yardstick competition' " concept was the result of "judicial exaltation" and "was not even undisputedly accepted in the legislative history." Rhode Island Cross-Petition at 6-7. In 1984 in *PASNY*, the Second Circuit addressed this issue directly and found that the NRA preference clause was "founded" on the "yardstick competition" concept. *PASNY*, 743 F.2d at 105; *see also MTA*, 796 F.2d at 591-92. It is far too late for Rhode Island to claim that "yardstick competition" is irrelevant. In fact, Rhode Island similarly argued in 1986 that the Commission and Second Circuit had misread the legislative history. No. 86-942, Cross-Petition at 17-21. The argument has no more substantive appeal now than it did five years ago.

2. VDPS and NYCPUS contend that the Second Circuit ruling conflicts with decisions of the D.C. Circuit (VDPS Petition at 10-11; NYCPUS Petition at 13), and argue that the decision will have

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[16] Similarly, COWPUSA argues that the application of the FERC's public body criteria "intermeddl[es]" in "matters fundamentally of state and local concern." (COWPUSA Petition at 31). Instead, COWPUSA argues, state law should be used in setting "public body" standards. *Id.* This argument was not raised below, was rejected in *PASNY*, 743 F.2d at 104-105 (rejecting claim that NRA preference clause must be squared with New York law), and, therefore, constitutes no basis for the granting of a writ of certiorari.

"[p]recedential [r]amifications" for the interpretation of other "federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies" (VDPS Petition at 11-12; NYCPUS Petition at 8). The Second Circuit's decision does not conflict with rulings in other circuits. VDPS and NYCPUS compare the decision below with the District of Columbia Circuit's refusal to defer to agency findings where those holdings were based on "an erroneous view of the law."[17] The cited cases are irrelevant, for the Second Circuit did not rule that an erroneous Commission interpretation of the NRA is nonetheless entitled to deference. Instead, the court found the Commission's interpretation of the NRA to be reasonable and consistent with the court's own precedents.[18]

3. VDPS contends (Petition at 15-16) that deference should have been accorded to PASNY, not the FERC. This contention was not raised before either the Second Circuit or the FERC. As such, it should not form the basis for granting a writ of certiorari. *McCullough v. Kammerer Corporation, et al*, 323 U.S. at 328.

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[17] VDPS Petition at 10-11, citing, *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir.), *cert. denied sub nom., Meyers Industries v. Prill*, 474 U.S. 948 (1985). *See also International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986). NYCPUS Petition at 13-14.

[18] Moreover, the D.C. Circuit's rulings in the cited cases depend heavily on the subject agencies' failure adequately to explain the bases for their results, failures very much at odds with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *See Phillips*, 729 F.2d at 1167, 1169-71; *Prill*, 755 F.2d at 947-48, 956.

In any event, the argument has no merit. It is well-settled that the FERC, not a licensee (such as PASNY) has the authority to interpret and enforce license terms. *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 396-7 (2d Cir. 1980), *cert. denied sub nom., Penn Yan v. New York State Electric & Gas Corp.*, 454 U.S. 821 (1981). The fact that this case involves *Commission* enforcement of an article in PASNY's *Commission* license (and enforcement of a provision in the NRA) puts it in sharp contrast to the genuinely shared jurisdiction at issue in *Secretary of Labor v. Occupational Safety and Health Review Commission*, 111 S.Ct. 1171 (1991), relied on by VDPS. Moreover, the Commission has previously rejected the notion that "[d]eference, if any, belonged to PASNY, not FERC" (VDPS Petition at 15). The FERC, in Opinion No. 151, noted that it had authority to enforce the NRA license terms since "Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." *MEUA v. PASNY*, 21 FERC at p. 61,126. *See also MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC at p. 61,644 (Commission need not defer to PASNY but may conduct *de novo* review). Thus, prior precedents dispose of the VDPS argument that PASNY, not the FERC, should be given deference.

4. VDPS, relying on the 1976 decision in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109 (1976) ("*VPSB*"), contends that deferral is improper because the Commission "several times" changed its position on VDPS's status as a "public body". VDPS Petition at 10, 16-17.

VDPS overstates the significance of *VPSB*, arguing that the Commission "explicitly held [in *VPSB*] that VDPS [the successor agency to the Vermont Public Service Board ("VPSB")] was a 'public body'. . . ." Petition at 17. In fact, the 1976 statements concerning VPSB's "public body" status were mere dictum.[19] The *VPSB* dictum was "reversed" in Opinion No. 229, and confirmed in Opinion No. 329. Thus, the alleged change in position occurred at most once, not "several" times, and any change was specifically addressed and explained in Opinion Nos. 229 and 229-A, and affirmed in *MTA*, as to which this Court denied certiorari. VDPS participated fully in those proceedings, but did not challenge before the Second Circuit the *VDPS* reversal. The court below was correct in granting "full" deference to the Commission.

Moreover, the *Chevron* deference doctrine is based on congressional delegation of authority to an agency, not on a need for finality in agency decisionmaking. 467 U.S. at 843-44. As explained in *Chevron*, in analyzing a new agency interpretation of the term "source":

> The fact that the agency has from time to time changed its interpretation of the term "source" does not . . . lead us to conclude

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[19] In *VPSB*, a dispute between Allegheny and VPSB over thirty megawatts of Niagara preference power, the Commission affirmed PASNY's determination that Allegheny should receive all of the disputed thirty megawatts. However, responding to an argument by Allegheny that VPSB did not qualify as a "public body" under the NRA because it resold preference power to investor-owned utilities, the Commission, *in a statement unnecessary to the outcome of the case*, indicated that VPSB did so qualify. 55 FPC at 1113.

> that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. *See also In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (administrative authorities may deal with changed circumstances).[20]

*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), relied on by VDPS, is not to the contrary. In *INS*, the Court applied the first step of the *Chevron* analysis, ruling that the meaning of the statute at issue was clear, thereby eliminating the need for *Chevron* deference. Moreover, the Court noted that the agency was inconsistent in its own reading of the statute, even to the extent of having already abandoned the very position for which it sought affirmation on the basis of *Chevron* deference, thus discounting the need to defer to the agency. *Id.* at 446, n.30.

5. VDPS (Petition at 12), joined by NYCPUS (Petition at 8), argues that the Second Circuit's ruling "would have substantial precedential impact" in part because the Tenth Circuit recently decided a case involving the meaning of a preference provision in an-

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[20] Other cases from this Court have emphasized the continuing validity of the *Chevron* deference standards quoted above. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-54 (1987) (Scalia, J. concurring); *NLRB v, United Food and Com'l Workers* Union, 484 U.S. 112, 133, (1987) (Scalia, J., concurring, emphasizes continuing validity of *Chevron* in light of "dicta" in *INS*).

other statute. *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) ("*Salt Lake*"). Both petitioners ignore that the Second and Tenth Circuit rulings are consistent, rendering review by this Court unnecessary.

The issue in *Salt Lake* was very similar to the "public body" question here, the only distinction being that the language in the applicable provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), grants a preference in hydroelectric power sales to "municipalities," a more specific term than "public bodies." The Western Area Power Administration ("WAPA"), interpreted "municipality" to mean a municipality that operated its own utility system, *i.e.*, one with "utility responsibility." The Tenth Circuit, applying *Chevron*, deferred to the agency's definition of "municipality," rejecting appellant's notion that the Oxford English Dictionary provided a sufficiently clear meaning. *Salt Lake*, 926 F.2d at 978, quoting *Chevron*, 467 U.S. at 844, quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961). The WAPA and Tenth Circuit emphasis on "utility responsibility" is in accord with the FERC and Second Circuit criteria for "public body" status—"direct responsibility" and "control" are the very crux of "utility responsibility."

Given the complete consistency between the Second Circuit and Tenth Circuit decisions, even as to their dual reliance on *Chevron*, petitioners are forced to rely on the dissent in the *Salt Lake* case. VDPS Petition at 12, n.10. A dissenting opinion hardly establishes a conflict between circuits meriting this Court's review.

6. VDPS's final argument is that the "control" criterion is "not the product of reasoned decisionmak-

ing" (Petition at 22).[21] In essence, VDPS claims that an NRA "public body" need not be responsible for the provision of any utility services, for the delivery of any specific amount of power, or for the control of any distribution facilities.

The requirements that NRA "public bodies" be directly responsible for consumer needs, and control the distribution facilities used to deliver the power to meet those needs, flow directly from the Commission's prior and judicially-affirmed holding that NRA "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers at retail," *not* consumers or brokers. *MTA v. FERC*, 796 F.2d at 595, *cert. denied*, 479 U.S. 1085, *citing with approval*, Opinion No. 229, 30 FERC at p. 61,651; *see also* 32 FERC at p. 61,445 (emphasis in original). The FERC had elaborated on this point in Opinion No. 229-A, stating, with regard to VDPS, that

> Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party *directly responsible* for the needs of the consumers served.

32 FERC at p. 61,444 (emphasis added). Thus, the FERC stated that "control is relevant not merely to the ability to meet customers' requirements but to

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[21] VDPS ignores FERC's requirement that a public body be "directly responsible" for the needs of its customers, arguing instead that "control" and "direct responsibility" are the same thing. (Petition at 23 n. 17). VDPS, by calling "responsibility" "control," cannot finesse the indisputable fact that neither VDPS nor the MDAs have any responsibilities to customers. Opinion No. 329, P.A. at 94-97.

doing so directly. . . ." Opinion No. 329, P.A. at 83 n.36.

First, VDPS argues that "yardstick competition comes from a comparison of rates, not the individual cost components thereof". Petition at 24. VDPS is wrong. "Yardstick competition" comes from the presence of publicly and privately-owned competitors, *i.e.*, real distribution utilities which control their own distribution (and other) costs, which constitute more than an allocated share of someone else's costs. Such entities foster, rather than eliminate, yardstick competition between municipal utilities and investor-owned utilities.

Second, VDPS wrongly claims that no lessee will be able to meet the "control" standard. Petition at 24-25. FERC case law reveals many instances—in the context of both electric and gas utilities—in which lessees have gained precisely the sort of operational (and, therefore, cost) control which VDPS claims is unavailable to petitioner "lessees." By the same token, the Commission has been unwilling to find that merely possessing legal title to, or a leasehold interest in, electric facilities makes the entity a jurisdictional "public utility."[22]

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[22] *See e.g., Citizens Power and Light Corp.*, 48 FERC (CCH) ¶ 61,210 (1989); *Fort Howard Corp.*, 48 FERC (CCH) ¶ 61,303 (1989); *Hennepin Energy Resources Co.*, 48 FERC (CCH) ¶ 62,224 (1989); *Niagara Mohawk Power Corp.*, 37 FERC (CCH) ¶ 61,081 (1986); *El Paso Electric Co.*, 36 FERC (CCH) ¶ 61,055 (1986); *Portland General Electric Co.*, 33 FERC (CCH) ¶ 61,459 (1985); *United Illuminating Co.*, 29 FERC (CCH) ¶ 61,270 (1984); *Public Service Company of New Mexico*, 29 FERC (CCH) ¶ 61,387 (1984); *Pacific Power and Light Co.*, 3 FERC (CCH) ¶ 61,119

Third, VDPS' claim (Petition at 25) that the Commission has *sub silentio* reversed its NRA "public body" determination in two unrelated *Central Vermont Public Service Corporation* orders (Petition at 25 & n.20) is erroneous. In the second of those orders, 53 FERC (CCH) ¶ 61,204 (1990), after having been alerted that VDPS was relying on the FERC's mere repetition of VDPS's self-description in the Second Circuit, the Commission stated expressly that

> [I]ts findings in this proceeding were not intended to reflect on or in any way modify its findings regarding [VDPS's] status for purposes of the issues addressed in Opinion No. 329. [VDPS] can best be described as a broker acting in both the wholesale and retail markets in the State of Vermont.

*Id.* at 61,818.[23]

Fourth, VDPS claims this criterion is "subject to a number of irreconcilable conflicts." Petition at 26. These "conflicts" do not exist and therefore do not merit Court review. VDPS first cites (Petition at 26) the FERC's recognition that, on occasion, an indus-

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(1978).

The same distinction has been applied with respect to natural gas utilities. *See American Louisiana Pipe Line Company, et al.*, 30 FPC 1211, 1212 (1963); *El Paso Natural* Gas Company, 19 FPC 371, 372 (1958).

[23] The Commission went on to note that a statement in the first *Central Vermont* order (52 FERC (CCH) ¶ 61,278 (1990)) concerning the Department's status as a retail competitor was "from the background section of the order, . . . and was not an assertion of the Commission's position. . . ." 53 FERC at 61,818, n.9.

trial customer is served by more than one supplier (*e.g.*, when the industrial customer serves itself by generating part of the power it needs). This statement is not an admission that an NRA "public body" need not control distribution facilities (or assume utility responsibilities).

VDPS then alleges an exception concerning "borderline agreements," which are inter-*utility* agreements under which a customer located on the "border" of a utility's service territory is for practical reasons actually served using the facilities of a second utility. The Commission determined that such agreements do not violate the control requirement because both companies to a borderline contract "still control their own distribution systems and bill *their own customers*." Opinion No. 329, P.A. at 89 (emphasis supplied). Moreover, even under a borderline agreement, the utility not operating the facilities—unlike VDPS and the MDAs—retains responsibility for ensuring that service is received and that load growth needs are met.

VDPS also contends that the FERC did not "reconcile why its control criterion applies only to distribution facilities". Petition at 26. In fact, the Commission stated (Opinion No. 329, P.A. at 89) that the focus of the NRA was on distribution, not transmission, a concept endorsed by the court in *MTA*, 796 F.2d at 592, and found to be consistent with other federal preference laws. *Id.* at 592 & n.7.[24]

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[24] In so arguing, VDPS, citing the ALJ and the lower court (P.A. at 10 and 44), inaccurately identifies " 'continuity of service' " as the "Commission's justification for the" control criterion (Petition at 26-27). VDPS has left out most of the multiple

Fifth, VDPS (joined by NYCPUS, Petition at 9-10) states that competition does not require control, citing cases in the natural gas and telecommunications industry, and that FERC failed to consider this argument. In fact, FERC recognized this argument, but rejected it:

> It is true that one need not own generation, transmission and distribution facilities to engage in the utility business. However, engaging in the utility business does not qualify an entity to receive preference power under the NRA.

P.A. at 89. In the same vein, it bears repeating that the Commission concluded that:

> In contending that they should be considered innovative alternative public bodies, and in their attacks upon the ALJ's yardstick and direct responsibility criteria, the MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has been re-

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justifications for the control criterion. As stated by the ALJ:

> The authority to fix rates and conditions of service must include the power to employ cost cutting measures in distribution as well as the ability to ensure the continuity of service. Only if an entity has all of these attributes does it satisfy this criterion.

Initial Decision, P.A. at 44. The reference to the opinion in *Allegheny v. FERC*, 922 F.2d at 79, P.A. at 10, is the portion of the lower court's decision in which it recites the findings of the ALJ.

> peatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

7. COWPUSA and Rhode Island, again revealing the apparent futility of their position, claim that the FERC's public body and "yardstick competition" standards "intermeddl[e] with matters fundamentally of state and local concern," COWPUSA petition at 31, and "offend [ ]. . .principles of federalism." Rhode Island petition at 14. This is nonsense. Their position is nothing less than an attack on the constitutionality of the Federal Power Act, which after all authorizes the Commission to issue licenses "to any State or municipality" and makes it unlawful for any "State, or municipality" to construct a hydroelectric project on navigable waters without a Commission license. 16 U.S.C. §§ 797(e), 817. COWPUSA's and Rhode Island's petitions are also the first time in this case that such a broadside attack has been levied on the FERC's licensing authority. They did not raise this issue below.

As explained above, however, the FERC's authority to enforce the Commission-issued license and the NRA against state agencies was an issue in the case leading up to Opinion 229. The Commission, in those decisions, found no reason to give special deference to PASNY because it was a state agency, and the Second Circuit rejected the same claim Rhode Island again makes here. The fundamental facts here are that Congress had and has jurisdiction over the Niagara River, and that the states stand in the same shoes as any other party under the relevant provisions of the Niagara and Federal Power Acts. There is no illegal infringement on states' rights.

## CONCLUSION

The Court should deny the petitions for certiorari filed by VDPS, NYCPUS and COWPUSA, and Rhode Island's cross-petition for certiorari.

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Respectfully submitted,

DAVID R. STRAUS
SCOTT H. STRAUSS
SPIEGEL & MCDIARMID
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
(202) 879-4000

*Attorneys for Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company*

ROBERT WEINBERG
CHARLES F. HOLUM
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

*Attorneys for Allegheny Electric Cooperative, Inc.*

KIRK HOWARD BETTS
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
1901 L Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 457-0160

*Attorney for the Public Power Association of New Jersey*

WALLACE L. DUNCAN*
JEFFREY C. GENZER
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

*Attorneys for the Municipal Electric Utilities Association of New York State*

**Counsel of Record*

REUBEN GOLDBERG
CHANNING D. STROTHER, JR.
GOLDBERG, FIELDMAN & LETHAM, P.C.
1100 Fifteenth Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 463-8300

CRAIG S. MILLER
JUNE W. WEINER
WILLIAM M. ONDREY GRUBER
City of Cleveland
Department of Law
Room 106, City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

*Attorneys for the City of Cleveland*